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NO. _____

IN THE
Supreme Court Of The United States

OCTOBER TERM, 1986

ANNA PICCININ,
Petitioner,
vs.
A.H. ROBINS COMPANY, INCORPORATED, ET AL.,
Respondents

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-2183

A.H. Robins Company, Incorporated,
Appellee,

versus

Anna Piccinin, Appellant.

and

Nancy Campbell, Kathryn Conrad, Jeanette Dicharry, Vernon Dicharry, Luisa Mosa, Stella J. Camp, John H. Camp, Helen Barnett, Michael Barnett, and Edna Lindsey Ruminiski,
Defendants.

Aetna Casualty and Surety Company,
Intervenor/Appellee.

No. 85-2184

A.H. Robins Company, Incorporated,
Debtor.

A.H. Robins Company, Incorporated,
Appellee,

versus

Committee Representatives of Dalkon Shield Claimants, Appellants.

Aetna Casualty and Surety Company,
Intervenor/Appellee.

No. 85-2185

A.H. Robins Company, Incorporated,
Debtor.

A.H. Robins Company, Incorporated,
Appellee,

versus

Kathryn Conrad, Luisa and
Jack Mosa, Appellants.

No. 85-2186

In Re:

A.H. Robins Company, Inc.,
Debtor.

A.H. Robins Company, Inc., Appellee,

versus

Anna Piccinin, Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond.
Robert R. Merhige, Jr., District Judge.
(85-01307-R)

Argued: December 3, 1985
Decided: April 10, 1986

Before RUSSELL and CHAPMAN, Circuit Judges, and SWYGERT, Senior Circuit Judge of the United States Court of Appeals for the Seven Circuit, sitting by designation.

C. Neal Pope (Max R. McGlamry; Pope, Kellogg, McGlamry, Kilpatrick & Morrison; Robert L. Dolbeare on brief) for Appellant Anna Piccinin; H. Robert Erwin, Jr. (Pretl & Schultheis, P.A. on brief) for Appellants Kathryn Conrad, Luisa Mosa and Jack Mosa; Mark C. Ellenberg (Murray Drabkin; Cadwalader, Wickersham & Taft; George B. Little; L.B. Cann, III; Little, Parsley & Cluverius, P.C. on brief) for Appellant Committee of Representatives of Dalkon Shield Claimants; Patrick A. Murphy (Penn Ayers Butler; Michael Kip Maly; Murphy, Weir & Butler; William R. Cogar; Bradfute W. Davenport, Jr.; Clifford W. Perrin, Jr.; James S. Crockett, Jr.; Mays, Valentine, Davenport & Moore on brief) for Appellee; Jan Z. Krasnowiecki for Intervenor.

RUSSELL, Circuit Judge:

Confronted, if not overwhelmed, with an avalanche of actions filed in various state and federal courts throughout the United States by citizens of this country as well as of foreign countries seeking damages for injuries allegedly sustained by the use of an intrauterine contraceptive device known as a Dalkon Shield,[1] the manufacturer of the device, A.H. Robins Company, Incorporated (Robins) filed its petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. Secs. 101 et. seq., in August, 1985.

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[1]For the current FDA regulation on intrauterine devices, see 21 C.F.R. Sec. 310.502 (1984).

Background

The device, which is the subject of these suits, had been developed in the 1960's by Dr. Hugh Davis at the Johns Hopkins Hospital in Baltimore, Maryland.[2] In mid-1970 Robins acquired all patent and marketing rights to the Dalkon Shield and engaged in the manufacture and marketing of the device from early 1971 until 1974, when it discontinued manufacture and sale of the device because of complaints and suits charging injuries arising allegedly out of the use of the device. The institution of Dalkon Shield suits did not, however, moderate with the

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[2] Book Note, 99 Harv.L.Rev. 875 (1986) (reviewing Engelmayer and Wagman, Lord's Justice: One Judge's Battle to Expose the Deadly Dalkon Shield I.U.D. (1985)).

discontinuance of manufacture of the device, since Robins did not actually recall the device until 1984.[3] By the middle of 1985, when the Chapter 11 petition was filed the number of such suits arising out of the continued sale and use of the Dalkon Shield device earlier put into the stream of commerce by Robins had grown to 5,000. More than half of these pending cases named Robins as the sole defendant; a co-defendant or co-defendants were named in the others. Prior to the filing, a number of suits had been tried and, while Robins had prevailed in some of the actions, judgments in large and burdensome amounts had

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[3] In response to that recall, Engelmayer & Wagman, supra, note 2, at 878, n.8, state that 4,500 women had removed the shield as of August, 1985, at a cost of $1,600,000.

been recovered in others. Many more had been settled.[4] Moreover, the costs of defending these suits both to Robins and to its insurance carrier had risen into the millions. A large amount of the time and energies of Robins' officers and executives was also being absorbed in preparing material for trial and in attending and testifying at depositions and trials. The problems arising out of this mounting tide of claims and suits precipitated this Chapter 11 proceeding.

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[4]Englemayer & Wagman, supra, note 2, at 876, n. 6, state that of the approximately 7,500 Dalkon Shield cases settled from 1972 to February 1985, fewer than 40 went to a jury.

A recent article in the Nat. L.J., p. 10, (March 17, 1986), states that by mid 1985, Robins, along with its insurer, Aetna Casualty & Surety Company, "had paid roughly $517 million for 25 trial judgments and 9,300 settlements since the first verdict in 1975."

The filing of the Chapter 11 petition automatically stayed all suits against Robins itself under section 362(a) of the Bankruptcy Code, even though no formal order of stay was immediately entered. See In re Larmar Estates, 5 B.R. 328, 330 (Bankr. E.D.N.Y. 1980). But a number of plaintiffs in suits where there were defendants other than Robins, sought to sever their actions against Robins and to proceed with their claims against the co-defendant or co-defendants. Robins responded to the move by filing an adversary proceeding in which it named as defendants the plaintiffs in eight such suits pending in various state and federal courts. In that proceeding, the debtor sought (1) declaratory relief adjudging that the debtor's products liability policy with Aetna Casualty and

Insurance Company (Aetna) was an asset of the estate in which all the Dalkon Shield plaintiffs and claimants had an interest and (2) injunctive relief restraining the prosecution of the actions against its co-defendants. Service of the summons and complaint in that adversary proceeding, a memorandum of law in support of the motion for a preliminary injunction therein, a notice of the debtor's intention to apply for a temporary restraining order, a copy of the proposed temporary restraining order and affidavits in support were duly mailed by first-class mail and by Federal Express to all the defendants and their attorneys at their addresses. See Bankruptcy Rule 7004, and Rule 4, Fed.R.Civ.P.

The debtor's application for a temporary restraining order and for the setting of a date for a hearing on the

request for preliminary injunction in the adversary proceeding was heard ex parte by the district judge who had jurisdiction over the proceedings.[5] The district judge granted at the time a temporary restraining order in the proceedings and set a hearing on the debtor's application for a preliminary injunction. On that same day, Robins mailed by first-class mail and by Federal Express to all the defendants and their attorneys at their addresses "Notice of Hearing on

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[5]Section 151 of the 1984 Amendments to the Bankruptcy Code provides that "[i]n each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for the district. Each bankruptcy judge . . . may exercise the authority conferred under this chapter . . . except as otherwise provided by law or by rule or order of the district court."

Plaintiff's Motion for Preliminary Injunction."

At the hearing on the motion for a preliminary injunction, a number of defendants as well as the Committee constituted by the court to represent Dalkon Shield Claimants appeared by counsel.[6] At the commencement of the hearing the defendant Piccinin, a plaintiff in one of the Dalkon Shield actions which Robins sought to stay, filed through her attorney a written motion to dismiss as against her. No other defendant filed a motion in response to the motion for a preliminary injunction. After receiving certain testimony,

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[6]For a discussion of the authorization for and responsibilities of such Committees, see Note, The Chapter 11 Creditors' Committee: Statutory Watchdog? 2 Bankr. Dev. J., 247 (1985)).

admitting various records, and hearing arguments of parties, the district court granted Robins' request for a preliminary injunction.

In his order granting the preliminary injunction, the district judge found (1) that continuation of litigation in the civil actions threatened property of Robins' estate, burdened and impeded Robins' reorganization effort, contravened the public interest, and rendered any plan of reorganization futile; (2) that this burden on Robins' estate outweighed any burden on the Dalkon claimants caused by enjoining their civil actions; and (3) that all remaining insurance coverage in favor of the debtor under its liability policy issued by Aetna was property of the Robins' Chapter 11 estate. The district judge then held that all actions for damages that might

be satisfied from proceeds of the Aetna insurance policy were subject to the stay pursuant to 11 U.S.C. Sec. 362(a)(3) and enjoined further litigation in the eight civil actions, pursuant to 11 U.S.C. Sec. 362(a)(1)(3) as supplemented by 11 U.S.C. Sec. 105.

Only the defendants Piccinin, the Mosas, and Conrad filed timely notices of appeal from the grant of the preliminary injunction. Their appeals, questioning the propriety of that preliminary injunction as against suits by Robins' co-defendants is the first of the issues now before this Court.

Some three weeks after entry of the preliminary injunction, Robins filed a motion for (1) a determination of trial venue of all Dalkon Shield suits, (2) identification of such Dalkon Shield cases as were "related to" the Chapter 11

case, and (3) transfer of such cases to the Eastern District of Virginia for trial. It also requested an expedited hearing on these motions. This request for an expedited hearing was granted and the expedited hearing was set ten days later. Notice of the hearing was given the Representatives of the Dalkon Shield Claimants Committee and the Unsecured Creditors Committee. The Committees and the defendants Piccinin, the Mosas and Conrad appeared by counsel at the hearing and joined in entering objections to the motion.

After a hearing on the motions, the district judge entered an order holding that (1) pursuant to 28 U.S.C. Sec. 1334(b), all actions based upon personal injury tort or wrongful death claims arising from the use of the Dalkon Shield were proceedings related to this Chapter

11 case over which this court had jurisdiction; (2) pursuant to 28 U.S.C. Secs. 157(b)(5)[7] and 1334(b), all such actions, wherever pending, were to be tried in the Richmond Division of the United States District Court for the Eastern District of Virginia; (3) all actions related to the Robins' Chapter 11 case now pending in any federal district court or subsequently removed to any federal district court, during the pendency of this Chapter 11 case, were to be transferred to this court [the Richmond Division of the United States District Court]; and (4) nothing in the order limited the

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[7] In Chatz & Schumm, 1984 Bankruptcy Code Amendments--Fresh from the Anvil, 89 Com.L.J., 317, 319-20 (1984), the authors refer to these two sections as the "critical sections" of the Amendments, establishing as they do what "a bankrupcy court can and cannot do."

power of this court [the Richmond Division of the United States District Court] later to abstain from hearing any proceeding under section 1334(c)(1) or remanding under section 1452(b), 28 U.S.C.

From this order, the Committee of Representatives of Dalkon Shield Claimants and the defendant Piccinin have appealed.[8] This appeal poses the second issue on appeal.

I

The initial question in the appeal of the first issue relates to the court's jurisdiction to grant a stay or injunction of suits in other courts against co-defendants of the debtor or of third

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[8]An order of the Honorable H. Emory Widener, Jr., after a motion for a stay pending appeal, permitted Aetna to intervene. Aetna appears in the appeal.

parties; none of the parties herein contest the jurisdiction of the bankruptcy court to stay actions against the debtor itself in any court. Jurisdiction over suits involving co-defendants or third-parties may be bottomed on two statutory provisions of the Bankruptcy Act itself as well as on the general equitable powers of the court. The first of these statutory grants of jurisdiction is found in section 362, 11 U.S.C. The purpose of this section by its various subsections is to protect the debtor from an uncontrollable scramble for its assets in a number of uncoordinated proceedings in different courts, to preclude one creditor from pursuing a remedy to the disadvantage of other creditors, and to provide the debtor and its executives with a reasonable respite from protracted litigation, during which they may have an

opportunity to formulate a plan of reorganization for the debtor. Matter of Holtkamp, 669 F.2d 505, 508 (7th Cir. 1982). As the Court in Fidelity Mortg. Investors v. Camelia Builders, Inc., 550 F.2d 47, 55 (2d Cir. 1976), cert. denied, 429 U.S. 1093, put it, "[t]he stay insures that the debtor's affairs will be centralized, initially, in a single forum in order to prevent conflicting judgments from different courts and in order to harmonize all of the creditors' interests with one another."

Section 362 is broken down into several subsections, only two of which are relevant on this appeal. The first of such subsections is (a)(1), which imposes an automatic stay of any proceeding "commenced or [that] could have been commenced against the debtor" at the time of the filing of the Chapter 11

proceeding; the second is (a)(3), which provides similar relief against suits involving the possession or custody of property of the debtor, irrespective of whether the suits are against the debtor alone or others. We shall discuss the extent of jurisdiction given the bankruptcy court under these two subsections, beginning with (a)(1).

(a)

Subsection (a)(1) is generally said to be available only to the debtor, not third party defendants or co-defendants. The rationale for this narrow construction of the statute has been stated in Lynch v. Johns-Manville Sales Corp., 710 F.2d 1194, 1196-1197 (6th Cir. 1983), and in our own case of Williford v. Armstrong World Industries, Inc., 715 F.2d 124, 126-127 (4th Cir. 1983), and it need not be repeated here. However, as the Court

in Johns-Manville Sales Corp., 26 B.R. 405, 410 (S.D.N.Y. 1983) remarked, in discussing the oft-cited case, Royal Trucks & Trailer v. Armadors Meritina Salvadoreana, 10 B.R. 488, 491 (N.D.Ill. 1981),[9] "there are cases [under 362(a)(1)] where a bankruptcy court may properly stay the proceedings against non-bankrupt co-defendants" but, it adds, that in order for relief for such non-bankrupt defendants to be available under (a)(1), there must be "unusual circumstances" and certainly "'[s]omething more than the mere fact that one of the parties to the lawsuit has filed a Chapter 11 bankruptcy must be shown in order that proceedings be stayed against non-bankrupt parties.'" This "unusual

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[9]This case is generally cited on the strict construction of this subsection.

situation," it would seem, arises when there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor. An illustration of such a situation would be a suit against a third-party who is entitled to absolute indemnity by the debtor on account of any judgment that might result against them in the case. To refuse application of the statutory stay in that case would defeat the very purpose and intent of the statute. This fact was recognized by the court in In Re Metal Center, 31 B.R. 485 (D.Conn. 1983).

In Metal Center the third-party plaintiff had been sued, along with the debtor, on his guaranty of the debtor's obligation. The third-party was entitled

to be indemnified by the debtor on account of any judgment rendered against him on account of his guaranty. While the action against both the debtor and the guarantor was pending, the debtor filed its Chapter 11 petition. The action was stayed against the debtor but the plaintiff sought to continue his suit against the guarantor. The guarantor at this point moved to stay the action as against him. The bankruptcy court reviewed the motion because of the possible "effect upon the debtor of a state court judgment against Gardner [the guarantor]." In discussing the issue, the court first dismissed as inapplicable to the facts of this case the situation where the third-party defendant was "independently liable as, for example, where the debtor and another are joint tort feasors or where the nondebtor's

liability rests upon his own breach of duty." It noted that in such a case "the automatic stay would clearly not extend to such non debtor." But, in contrast to those situations, it cleared that "where, however, a debtor and nondebtor are so bound by statute or contract that the liability of the nondebtor is imputed to the debtor by operation of law, then the Congressional intent to provide relief to debtors would be frustrated by permitting indirectly what is expressly prohibited in the Code." It concluded with the statement: "Clearly the debtor's protection must be extended to enjoin litigation against others if the result would be binding upon the debtor's estate," and this is so, whether the debtor is a party or not. 31 B.R. at 462.

It is true that, although the third-party defendant in Metal Center was

found to be entitled to indemnity from the debtor, the court held that the situation was not such as to qualify for a stay under section 362(a)(1). The court reached this conclusion because in its opinion the judgment in the suit against the third party would not be binding on the bankruptcy court. Of course, if the indemnitee, who has suffered a judgment for which he is entitled to be absolutely indemnified by the debtor, cannot file and have allowed as an adjudicated claim the actual amount of the judgment he has suffered but must submit his claim for allowance in the bankruptcy proceeding with the prospect that his claim may not be allowed in the full amount of the judgment awarded against him, the indemnitee will be unfairly mulcted by inconsistent judgments and his contract of indemnity in

effect nullified. We do not accept such reasoning with its shocking result and would find a stay under (a)(1) acceptable. Apparently the court in Metal Center recognized the inconsistency and the injustice resulting from its refusal to sustain a stay under (a)(1) for it did grant a stay of the action against the third-party but on equitable grounds, finding in justification that "severing and remanding [the plaintiff's action against the indemnitee to the state court for the trial and judgment would] . . . potentially expose[s] Gardner [the indemnitee] to inconsistent judgments." 31 B.R. at 463. While, as we have said, it seems that a ruling sustaining the stay in that case under section 362(a)(1) would have been more logical and appropriate, it is unimportant whether the stay is granted under section 362(a)(1)

or on equitable grounds: the result is the same; a stay is proper in such a situation.

In Seybolt v. Bio-Energy of Lincoln, Inc., 38 B.R. 123 (D. Mass. 1984), the issue was similar to that in Metal Center, i.e., whether a guarantor entitled to indemnity by the debtor would be entitled to seek a stay under section 362(a)(1). In granting the stay in that case, the Court, after quoting the language of Metal Center with respect to the case in which "the liability of the non-debtor is imputed to the debtor by operation of law," said:

> The concept that notice and an opportunity to defend binds the principal on a judgment against a guarantor (in a case in which the principal did not participate) springs from notions of res judicata. If George Seybolt recovers a judgment against the guarantors in the state court, Bio-Energy Associates' assertion that the $100,000 was not a loan but a

> contribution to capital may well be rendered moot when the guarantor subsequently asserts a claim against it for indemnity. At the very least, the dual litigation of these issues in the state court and the bankruptcy court is not judicially economic and potentially exposes Bio-Energy, Inc. and Bio-Energy Associates to inconsistent judgments. See In re Metal Center, Inc., supra, at 463.
>
> Accordingly, I find that George Seybolt's claims against the individual guarantors are within this Court's jurisdiction and should be stayed until an appropriate motion for relief from stay is filed and granted by the bankruptcy court. 38 B.R. at 127-28.

In Re Brentano's, 27 B.R. 90 (S.D. N.Y. 1983), also involved the situation of a guarantor of a debtor in a Chapter 11 proceeding who was entitled under contract to indemnity by the debtor against any judgment against him. While the case did not directly concern section 362 but the question of bankruptcy jurisdiction, the language of the court

appears relevant on the issue under review here. It said that the action against the guarantor-indemnitee "could and would affect the estate in bankruptcy," since, under the indemnity agreement, "a judgment in favor of the [plaintiff] in the guaranty action would automatically result in indemnification liability against Brentano's" [i.e., the indemnitor]. Accepting this language one would have difficulty in not concluding that the action was in effect one against the debtor and as such would qualify for relief under (a)(1). Brentano's is cited and discussed in Pacor, Inc. v. Higgins, 743 F.2d 984, 995 (3d Cir. 1984), which was an asbestos case. The issue in Pacor, as in Brentano's, was one of bankruptcy jurisdiction. The court described the facts in Breantano's and

stated the resulting legal situation as follows:

> In Brentano's, however, it is clear that the action between the landlord and MacMillan could and would affect the estate in bankruptcy. By virtue of the indemnification agreement between Brentano's and MacMillan, a judgment in favor of the landlord on the guarantee action would automatically result in indemnification liability against Brentano's. See also In re Johnie T. Patton, Inc., 12 B.R. 470 (Bankr.D.Nev. 1981); In re Lucasa International, Ltd., 6 B.R. 717 (Bankr.S.D.N.Y. 1980); In re Brothers Coal Co., 6 B.R. 567 (Bankr. W.D.Va. 1980) (all involving guarantors of debtor's obligations). Moreover, even in the absence of an explicit indemnification agreement, an action by a creditor against a guarantor of a debtor's obligations will necessarily affect that that [sic] the creditor's status vis a vis other creditors, and administration of the estate therefore depends upon the outcome of that litigation. 743 F.2d at 995.

Pacor, however, found Brentano's inapplicable in its case because:

> In this case, however, there would be no automatic creation of liability against Manville on account of a judgment against Pacor. Pacor is not a contractual guarantor of Manville, nor has Manville agreed to indemnify Pacor, and thus a judgment in the Higgins-Pacor action could not give rise to any automatic liability on the part of the estate. 743 F.2d at 995.

The clear implication of the decision is that, if there had been a contract to indemnify, a contrary result would have been in order.

(b)

But (a)(1), which stays actions against the debtor and arguably against those whose interests are so intimately intertwined with those of the debtor that the latter may be said to be the real party in interest, is not the only part of section 362 providing for an automatic stay of proceedings. Subsection (a)(3) directs stays of any action, <u>whether</u>

against the debtor or third-parties, to obtain possession or to exercise control over property of the debtor. A key phrase in the construction and application of this section is, of course, "property" as that term is used in the Act. Section 541(a)(1) of the Bankruptcy Act defines "property" in the bankruptcy context. It provides that the "estate is comprised of all the following property, wherever located . . . all legal or equitable interests of the debtor in property as of the commencement of the case." The Supreme Court in construing this language in United States v. Whiting Pools, Inc., 462 U.S. 198, 205, n.9, quoted this language in the legislative history of the Section:

> The scope of this paragraph [541(a)(1)] is broad. It included all kinds of property including tangible or intangible property, causes of action (see Bankruptcy Act Sec.

> 70a(6)), and all other forms of property currently specified in section 70a of the Bankruptcy Act.

Under the weight of authority, insurance contracts have been said to be embraced in this statutory definition of "property." In re Davis, 730 F.2d 176, 184 (5th Cir. 1984). For example, even the right to cancel an insurance policy issued to the debtor has uniformly been held to be stayed under section 362(a)(3). Lam, Cancellation of Insurance: Bankruptcy Automatic Stay Implications, 59 Am. Bank. L.J., 267 (1985), (extensively reviewing the cases to this effect). A products liability policy of the debtor is similarly within the principle: it is a valuable property of a debtor, particularly if the debtor is confronted with substantial liability claims within the coverage of the policy in which case the policy may well be, as

one court has remarked in a case like the one under review, "the most important asset of [i.e., the debtor's] estate," In re Johns Manville Corp., 40 B.R. 219, 229 (S.D.N.Y. 1984). Any action in which the judgment may diminish this "important asset" is unquestionably subject to a stay under this subjection. In re Johns Manville Corp., 33 B.R. 254, 261 (S.D. N.Y. 1983). Accordingly actions "related to" the bankruptcy proceedings against the insurer or against officers or employees of the debtor who may be entitled to indemnification under such policy or who qualify as additional insureds under the policy are to be stayed under section 362(a)(3). Ibid.[10]

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[10]There is nothing in In Re White Motor Credit, 761 F.2d 270, 274 (6th Cir. 1985) in any way contrary to this

(Footnote Continued)

(c)

The statutory power of the bankruptcy court to stay actions involving the debtor or its property is not, however, limited to section 362(a)(1) and

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(Footnote Continued)
conclusion; in fact, it sustains the construction of the statute adopted by us. In White, the parties were in agreement that the products liability insurance was adequate to cover all claims filed but the court cautioned that had this not been so, the result in that case would have been different:

> Were it not for the fact that all parties are in agreement that the insurance coverage is adequate to cover all filed claims, it would be necessary to liquidate all claims before any insurance was paid out; otherwise, some claimants would receive an unequal portion of the insurance assets of the debtor.

It is obvious from that statement of the court that White actually sustains the result reached by us that, if the liability insurance is inadequate to satisfy in full all claims under the insurance, the actions by claimants should be stayed and the claims should be "liquidated" in the bankruptcy court.

(a)(3). It has been repeatedly held that 11 U.S.C. Sec. 105 which provides that the bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," "empowers the bankruptcy court to enjoin parties other than the bankrupt" from commencing or continuing litigation. In re Otero Mills, Inc., 25 B.R. 1018, 1020 (D.N.M. 1982).[11] In that case, the Court said:

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[11]There can be no dispute that the Bankruptcy Reform Act of 1978 and like language later in section 1334(b) of the Bankruptcy Amendments of 1984 greatly enlarged the jurisdiction of the bankruptcy courts and were, as stated in the legislative history, intended to "leave no doubt as to the scope of the bankruptcy court's jurisdiction over disputes." H. Rep. No. 95-595, 95th Cong. 2d Sess. 445, reprinted in 1978 U.S., Code Cong. & Adm. News, 5963, 6401. Those sections provide jurisdiction in the bankruptcy case over any proceedings arising in or related to a title 11 case.
(Footnote Continued)

Appellant cites only one case decided under the 1978 Bankruptcy Code which found

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(Footnote Continued)
The accepted definition of the "related to" in these statutes is that declared in Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984):

> An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.

See also Note, Selective Exercise of Jurisdiction in Bankruptcy-Related Civil Proceedings, 59 Tex.L.Rev. 325, 330-31 (1981):

> One can imagine controversies over which the new bankruptcy courts [under 1471(b)] would have jurisdiction even if neither the debtor nor a representative of the estate were a party, and it is difficult to imagine any instance in which a bankruptcy court would not have jurisdiction if the debtor were a party.

It is true that both Pacor and the Texas Note were referring to section 1471(b) of the 1978 Act. That section, however, was re-enacted in the exact words of the

(Footnote Continued)

that the bankruptcy court lacked [under Sec. 105] the power to enjoin parties from pursuing actions against non-bankrupts in state court. In re Aboussie Brothers Construction Co., 8 B.R. 302 (D.C.E.D.Mo. 1981). In Aboussie, the court did not address Sec. 105(a), but relied on cases decided under the old Bankruptcy Act to hold that there was no jurisdiction to enjoin parties from pursing actions which did not involve the bankrupt directly. The pre-1978 Act confined jurisdiction to "the debtor and his property, wherever located." Act of June 22, 1938, ch. 575, Sec. 1, 52 Stat. 906 (1938). Under the new Bankruptcy Code, the jurisdictional statute provides that the bankruptcy court shall have jurisdiction "of all civil proceedings

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(Footnote Continued)
repealed 1471(b) in section 1334(a) and (b) of the 1984 Act. Therefore, "[t]he jurisdiction conferred on the district court [under the 1984 Act's section 1334(a) and (b)] is exactly the same jurisdiction that was conferred on the district courts under the Bankruptcy Reform Act [of 1978]." Taggart, The New Bankruptcy Court Systems, 59 Am. Bank. L.J. 231, 239 (1985). To the same effect, King, Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984, 38 Vand. L.Rev. 675, 677 (1985).

> arising under title 11 or arising in or related to cases under title 11." 28 U.S.C.A. Sec. 1471 (Supp. 1982). This broader jurisdictional statute, combined with Sec. 105(a), grants the bankruptcy court power to enjoin parties from proceeding in state court against non-bankrupts where the state proceeding is related to a case arising under Title 11. 25 B.R. at 1020.

In stating the same scope for section 105, the Court in Johns-Manville Corp., 26 B.R. 420, 425 (S.D.N.Y. 1983), quoting from 2 Collier on Bankruptcy Secs. 362.02 and 362.05 (15th ed. 1982), put the matter thus:

> [Section 362 of the Code] does not attempt to state the jurisdiction of the bankruptcy court with respect to stays and injunctive relief or to determine the boundaries of the exercise of the court's injunctive power.
>
> Section 105 which is the successor to Section 2A(15), gives the court the power to issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title.

> [T]he exceptions to the automatic stay of Sec. 362(a) which are set forth in Sec. 362 (b) are simply exceptions to the stay which protect the estate automatically at the commencement of the case and are not limitations upon the jurisdiction of the bankruptcy court or upon its power to enjoin. That power is generally based upon Sec. 105 of the Code. The court will have ample power to enjoin actions excepted from the automatic stay which might interfere in the rehabilitative process whether in a liquidation or in a reorganization case.

See to the same effect, In Re Landmark, 19 B.R. 556, 559 (N.D. Ohio 1982); In Re Larmar Estates, Inc., 5 B.R. 328, 330-31 (S.D.N.Y. 1980).

Accepting that section 105 confers on the bankruptcy court power under its expanded jurisdiction as expressed in section 1471(b) [28 U.S.C.] of the Bankruptcy Reform Act of 1978 and now section 1334(b), 28 U.S.C. of the 1984 Bankruptcy Amendments to enjoin suits

against parties in other courts, whether state or federal, it is necessary to mark out the circumstances under which the power or jurisdiction may be exercised. In Otero Mills, supra, the Court approved a ruling that "[t]o so enjoin a creditor's action against a third party, the court must find that failure to enjoin would effect [sic] the bankruptcy estate and would adversely or detrimentally influence and pressure the debtor through the third party." 25 B.R. at 1020. In Johns-Manville, the Court phrased somewhat fuller the circumstances when section 105 may support a stay:

> In the exercise of its authority under Sec. 105, the Bankruptcy Court may use its injunctive authority to "protect the integrity of a bankrupt's estate and the Bankruptcy Court's custody thereof and to preserve to that Court the ability to exercise the authority delegated to it by Congress" [citing authority]. Pursuant to the exercise of

> that authority the Court may issue or extend stays to enjoin a variety of proceedings [including discovery against the debtor or its officers and employees] which will have an adverse impact on the Debtor's ability to formulate a Chapter 11 plan. 40 B.R. at 226.

(d)

Beyond these statutory powers under section 362 and section 105 to enjoin other actions whether against the debtor or third-parties and in whatsoever court, the bankruptcy court under its comprehensive jurisdiction as conferred by section 1334, 28 U.S.C., has the "inherent power of courts under their general equity powers and in the efficient management of the dockets to grant relief" to grant a stay. Williford v. Armstrong World Industries, Inc., supra, 715 F.2d at 127, Austin v. Unarco Industries, Inc., 705 F.2d 1, 5 (1st Cir. 1983). In exercising such power the court, however, must

"weigh competing interests and maintain an even balance" and must justify the stay "by clear and convincing circumstances outweighing potential harm to the party against whom it is operative." Williford, supra, Metal Center and Seybolt, discussed supra, are illustrative of situations in which courts have found sufficient grounds to grant a stay under this power.

(e)

There are thus four grounds on which the bankruptcy court may enjoin suits against the bankrupt or its assets and property. In some instances only one of these grounds may be relevant; in an involved and complex case, several or even all of the grounds may require consideration. The present case is such an involved and complex case. It has a striking similarity to a Chapter 11

proceedings, initially begun in the bankruptcy court of the Southern District of New York, concerning the reorganization of the Johns-Manville Corporation. In that proceeding, which was litigated both in the New York and Louisiana courts, many of the issues posed on this aspect of the case were raised and analyzed by the courts of the two circuits and the decisions resolving such issues present in a practical form the application of the power of a bankruptcy court to stay actions relating to the bankruptcy proceeding against the debtor, its property and their operations. For this reason, it seems pertinent to review the decisions in those proceedings, for their guidance on the resolution of the issue herein. We begin with the initial proceedings in the bankruptcy court of the Southern District of New York.

(f)

Johns-Manville, an asbestos producer, was beset by a mass of suits seeking large awards for damages sustained by reason of asbestos exposure much as has Robins in this case and, after suffering large and burdensome recoveries by plaintiffs and making substantial settlements in many of the cases, filed its Chapter 11 petition in the Southern District of New York in August, 1982. Such filing operated as an automatic stay of all proceedings against Johns-Manville. However, many of the thousands of cases named as defendants not only Johns-Manville but a number of other asbestos producers and dealers as co-defendants. Shortly after Johns-Manville filed its Chapter 11 petition, these co-defendants, charged in the complaints of the plaintiffs in the actions as joint

tort feasors, sought judicial relief in the bankruptcy court, "inviting," that court by way of a declaratory judgment in the exercise of "its equitable powers" to enlarge the automatic stay provided by section 362 of the Act to include non-debtor defendants "under the penumbra of section 362's protection" as well as under section 105, and to extend this stay throughout the nation to all asbestos litigation. Matter of Johns-Manville Corp., 26 B.R. 405 (S.D.N.Y. 1983). The primary issue at this stage was stated to be "whether this Court should take the unprecedented step of exercising its discretion pursuant to section 105 of the Code to extend the section 362 automatic stay so as to encompass the co-defendants herein." 26 B.R. at 408-409. The bankruptcy court ruled, first, "that section 362 is limited in scope to the

debtor and does not operate to stay actions against the co-defendants of this debtor." 26 B.R. at 409-414. Secondly, it held that relief under section 105 is only available if found to be "necessary or appropriate in order to achieve the goals of a Chapter 11 reorganization," and, even then, only after a finding that "a failure to enjoin would affect the bankruptcy estate and would adversely or detrimentally influence and pressure the debtor through that third-party," thereby justifying a finding of irreparable injury and likelihood of prevailing on the merits. None of these facts the court found present on the instant showing, but it added:

> In an appropriate case, where the proposed extension of the stay is designed to cover actions against entities that truly are inextricably interwoven with the debtor or which affect property of the debtor's estate, section 105 may be

> used. In the instant case, such is not the situation as any liability of these co-defendants is not directly attributable to the debtor as it would be if these co-defendants were, for example, key employees of the debtor. 26 B.R. at 418 (italics in text).

It concluded by declaring that there was "no basis [as shown by the record] to extend the section 362 stay to cover them [the appeals] by means of section 105."

A second action was begun shortly afterwards, this time by the debtor, to enjoin (1) the prosecution of "proceedings against Manville's employees, agents and others" and of discovery proceedings involving them in actions covering "the same issues and subject-matter as are involved in the stayed litigations against Manville," (2) "'direct action' lawsuits against insurers and sureties of

the debtor"[12] since the coverage of such policies of insurance or suretyship "represent[ed] property of [the debtor's] estate which must be preserved for the benefit of all creditors," and (3) a suit brought by certain security holders against "various of the 'employees, agents and others'" in the district court of Colorado. In re Johns-Manville Corp., 26 B.R. 420, 423 (S.D.N.Y. 1983). It will be observed that this proceeding involved matters not litigated in the earlier proceeding; in fact, it involved actions against the debtor's employees for actions attributable to Manville, precisely the point which the court in

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[12]"Direct actions" against insurers are described in Wedgeworth v. Fibeboard [sic] Corp., 706 F.2d 541, 546-47 (5th Cir. 1983), and were recognized in Lumbermen's Mutual Casualty Co. v. Elbert, 384 U.S. 48, 50 (1964).

the earlier case had said was not before it at that time. The bankruptcy court granted a temporary injunction against the continuance of either the suits or of discovery against present or future officers, employees and agents but refused a stay for past officers and employees. In reaching that conclusion it found that "in great measure the suits being pursued against Manville's officers and employees are in reality derivative of identical claims brought against Manville," which, if sustained against the officers and employees, would expose the estate "to claims for contribution and indemnification" and might result in collateral estoppel against the debtor "in subsequent actions." 26 B.R. at 426. It accordingly held it proper to stay these actions and discovery "against [such] non-debtors which would frustrate

the statutory scheme or impact adversely on a debtor's ability to formulate a plan or on the debtor's property." 26 B.R. at 427. It further granted the injunction against the security action, finding "that [such] suit is nothing more than an effort to circumvent section 362 by suing Manville's officers and directors when the real party in interest is Manville. In all but formal detail, the [security] litigation is against the debtor within the meaning of section 362." 26 B.R. at 428. It, also, said that:

> An adverse judgment in the [security] case would have serious consequences for the debtor's estate. Manville's By-Laws require it to indemnify its officers and directors for their litigation expenses, including any amounts paid to satisfy a judgment of liability, so long as the conduct at issue was intended to benefit the company . . . . Although Manville believes that the insurance policies which it had in force cover these expenses, the insurance company has

> reserved its right to contest coverage and to terminate on 30 days notice the payment of defense costs. If the insurance company fails to live up to its obligations, the officers and directors would look to the Company for reimbursement pursuant to the By-Laws. In any event, the policies have specific dollar limits beyond which Manville itself must pay. To the extent expenditures related to the (security) suit exhaust those limits, an asset of the estate is diminished and Manville's exposure in other litigations increases. 26 B.R. at 429.

But it denied a stay of the suits against the insurers and sureties, saying:

> Unlike suits against the debtor's employees and agents, Manville maintains no obligation to indemnify or pay for the defense costs of its insurers or sureties. Thus, the liability of these insurers and sureties in no way inures to the detriment of the Manville estate. 26 B.R. at 431.

On motion for rehearing, however, the bankruptcy court withdrew its decision denying an irjunction against suits

directed against the debtor's insurers and granted such injunction. It did so on the basis of these findings:

> The debtor "could be adversely affected by the continuation of such suits" since the "insurance policies and proceeds thereof and the causes of action previously asserted by Manville against its insurance carriers in suits pending in California ("California Insurance Litigation") and elsewhere constitute substantial property of the Manville estate which will be diminished if and to the extent that third party direct actions against the insurance carriers result in plaintiffs' judgments" and since "important issues respecting policy coverage and liability may be pressed as collaterally estopping Manville." 26 B.R. at 435. Further, "[t]o permit the third party actions to continue against Manville's insurance carriers will result in a multiplicity of positions and defenses on the part of the insurance carriers and will most likely result in inconsistent decisions and rulings concerning the coverage and liability of the insurance carriers to the third party

claimants and to Manville. Such a disorganized and fragmented procedure for resolving such major issues will undermine Manville's attempt at reorganization." 26 B.R. at 436.

It ended with these legal conclusions:

1. "Manville's rights under its insurance policies and all the causes of action arising thereunder constitute property of the Manville estates within the purview of section 541(a) of the Code." 26 B.R. at 436.

2. "Pursuant to Sec. 105(a), the Bankruptcy Court may extend the automatic stay under Sec. 362 of the Code to stay and enjoin proceedings or acts against non-debtors where such actions would interfere with, deplete or adversely affect property of Manville's estates or which would frustrate the statutory scheme of Chapter 11 or diminish Manville's ability to formulate a plan of reorganization." 26 B.R. at 436.

3. Pursuant to Sec. 362(a) of the Code, all actions "to obtain possession of or interfere with property from Manville estates" are stayed and enjoined. 26 B.R. 436.

As a result of action in the Fifth Circuit to which we later advert and in order to enlarge the stay theretofore granted to include past officers and employees, (the court having reached the decision that suits against past as well as present employees of the debtor should be stayed) the bankruptcy court in New York entered a third reported decision in 33 B.R. 254 (S.D.N.Y. 1983). It found that:

> In the event of a recovery against the past or present officers, directors or employees of Manville in any of the pending 1,000 cases, Manville's insurers may be called upon to indemnify such officers, directors and employees under the provisions of the policies issued by them to Manville. If such insurers are called upon to make such indemnification payments, those payments may cause an asset of the Manville estates to be diminished. 33 B.R. at 261.

It reiterated in this same decision its ruling that the insurance policies

constituted assets of the debtor, and stated the test for granting a stay or injunction in the circumstances: "(a) possible irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." It concluded by granting the stay in favor of the insurers and the past as well as present directors, officers and employees, finding that the required findings for a preliminary injunction had been satisfied. 33 B.R. at 262-63.

On appeal of certain of these decisions, the district court affirmed the decisions of the Bankruptcy Court staying discovery of any officers, directors or employees of the debtor and

ruled that the provisions of section 362 stayed proceedings against the debtor's insurers. Specifically, it declared that "the fact that it [Manville] ultimately may not receive all of the proceeds under its products liability insurance does not affect its status as property under the Code subject to the provisions of the automatic stay." 40 B.R. at 230.

At the same time that these Johns-Manville cases were proceeding in New York, similar issues were arising in asbestos cases filed against Johns-Manville, other joint tortfeasors, and their insurers in the three districts of Louisiana. The three district courts had ruled differently on the right to a stay of all co-defendants of Manville, there being no dispute that the stay was proper of Manville itself. On appeal, the Court of Appeals held in Wedgeworth v.

Fiberboard, 706 F.2d 541 (5th Cir. 1983), that the automatic stay applied only to Manville, not to the other defendants and that the showing as made was insufficient to sustain a stay in favor of the co-defendants under equitable principles; however, it sustained the right of the plaintiffs to amend their complaints to state a "direct action" under the Louisiana statute against Manville's insurer and held that such an action was not stayed by any provision of the Bankruptcy Act. After a petition for rehearing, however, the Court modified its decision on the plaintiffs' motion to amend and held "that the district did not abuse its discretion in declining to permit the plaintiffs to amend their complaints to add, as party defendants, the liability insurance carriers of Johns-Manville and Unarco." 706 F.2d at

548. Two days after this decision was filed, the bankruptcy court modified its previous orders by staying "any and all suits against any past, present or future Manville officer, director or employee or against [his or her] insurers." It added in this order, also, that its prior order would be amended to preclude discovery of the parties against whom suits were proscribed. In an appeal based on a petition for certiorari and for a writ of prohibition against a contempt order against plaintiffs' counsel for violating such stay, the orders of the bankruptcy court were in effect sustained in In Re Davis, 730 F.2d 176 (5th Cir. 1984).

(g)

As we have earlier indicated, we have discussed at some length these proceedings in the Johns-Manville proceedings in New York and Louisiana,

because, with their striking similarity both factually and on the legal issues to this case, the decisions of those courts provide persuasive guidance for our action herein. Though the district judge below did not cite the various rulings of the Manville courts in support of his decision, there was a close identity of issues between those in the Manville cases and in the present case. In the three situations in which the defendants have challenged the injunction granted by the district judge [i.e., the Mosa, Conrad and Piccinin cases], the only defendants other than the debtor, are the two Robins, Dr. Frederick A. Clark, Jr., Dr. Hugh J. Davis, and the debtor's insurer Aetna. So far as the suits against the two Robins and Dr. Clark, those defendants were entitled to indemnification by the debtor under the

corporate by-laws and the statutes of Virginia, the state of debtor's incorporation,[13] and were, in addition, additional insureds under the debtor's insurance policy. Dr. Davis was the

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[13]It is the accepted practice for corporations such as the debtor to indemnify their directors, officers and employees for the costs of their defense for any judgment rendered against them in such cases. See A.D.M. Corp. v. Thorison, 707 F.2d 25, 28 (1st Cir. 1983); 13 Fletcher, Cyclopedia of the Law of Corporations, Sec. 6045.1 and 6045.3 (1980 ed.). Virginia, the State of the debtor's incorporation, has by statute empowered corporations of that State, by their charter, to provide for such indemnity. Section 13.1-3, 1 Virginia Code; Fletcher, supra, section 6045.2-235. The charter of the debtor, included in the record, provides such right of indemnification for the directors, officers and employees of the debtor in the broadest sense. As we have seen, a stay in favor of such officers, directors and employees, protected as they are by the right to indemnity from the debtor, and the record in this case shows undisputably that these directors and employees are so protected, was in order.

beneficiary of an express contract of indemnification on the part of Robins and was, under a compromise agreement with Robins and Aetna, an additional insured under Robins' insurance policy. The Manville court had granted a preliminary injunction in favor of defendants in the same position as these defendants, as we have seen, on facts similar to those here, finding that the requirements of possible irreparable harm "had been satisfied by the showing . . . [that the suits against the defendants would represent] an immediate and irreparable impact on the pool of insurance assets, of the existence of sufficiently serious questions going to the merits," and of the tipping in the defendants' favor in the hardships in a balancing of the debtor's and the plaintiffs'. 33 B.R. at 262-63. That court had previously

disposed of the public interest being weighted in the debtor's favor: "Indeed, this Court finds the goal of removing all obstacles to plan formulation eminently praiseworthy and supports every lawful effort to foster this goal while protecting the due process rights of all constituencies." 26 B.R. at 428.

II

The district court in this case applied the test for a grant of preliminary injunctive relief as stated by us in Blackwelder Furniture, 550 F.2d 189, 195 (4th Cir. 1977), and Televest v. Bradshaw, 618 F.2d 1029, 1032 (4th Cir. 1980). It found, as had the Johns-Manville courts, that irreparable harm would be suffered by the debtor and by the defendants since any of these suits against these co-defendants, if successful, would reduce and diminish the

insurance fund or pool represented in Aetna's policy in favor of Robins and thereby affect the property of the debtor to the detriment of the debtor's creditors as a whole. The likelihood of success by the debtor under these circumstances appeared indisputable. The hardships which would be suffered irreparably by the debtor and by its creditors generally in permitting these plaintiffs to secure as it were a preference in the distribution of the insurance pool herein to which all creditors were entitled, together with the unquestioned public interest in promoting a viable reorganization of the debtor can be said to outweigh any contrary hardship to the plaintiffs. Such was the finding in the Manville cases and that finding does not appear unreasonable here.

The appellants, however, suggest that the record is insufficient to support such findings by the district judge. We disagree. The record is not extensive but it includes every fact considered by the courts in the Manville cases to be necessary for their decision. The rights of Dr. Davis, Dr. Clark and the two Robins to indemnity and their status as additional insureds under Robins' insurance policy are undisputed on the record. That there are thousands of Dalkon Shield actions and claims pending is a fact established in the record and the limited fund available under Robins' insurance policy is recognized in the records. It seems incontestable that, if the suits are permitted to continue and discovery allowed, any effort at reorganization of the debtor will be frustrated, if not permanently

thwarted. It is obvious from the record that if suits are permitted to proceed against indemnitees on claims on which the indemnitees are entitled to indemnity by Robins, either a binding judgment against the debtor will result or, as the court in Metal Center said, inconsistent judgments will result, calling for the exercise of the court's equitable powers. In our opinion, the record was thus more than adequate to support the district court's grant of injunctive relief. Certainly, the district court did not commit an abuse of discretion in granting the injunction herein.

The appellants add a final complaining note that the district judge stated in his decision that the "Conclusions of Law" made by him should apply "with equal force to all defendants similarly situated who are brought to the attention of

the court." This is little different, however, from the language of the court in the Manville cases in which there was a broad, general injunction against all present or future suits.

In summary, we have no difficulty in sustaining the grant of a preliminary injunction herein. We are sustained in this conclusion by the fact, recognized by the district judge on the record, that any Dalkon Shield plaintiff may at any time petition for the vacation of the stay as it affects his or her suit and he or she is entitled to a hearing on such petition. Actually, there is one such petition pending and the district judge has agreed to set a hearing on that petition.

III

The second appeal questions the validity of the district court's order of

November 9, 1985, fixing the venue for the trial of all Dalkon Shield cases and providing for the transfer of such cases to the District Court of the Eastern District of Virginia at Richmond. Robins has challenged the appealability of such order. We find the challenge without merit.

It is unquestionably true that, as the Court in In Re Amatex Corp., 755 F.2d 1034, 1038-9 (3d Cir. 1985), declared, jurisdiction in a Court of Appeals to review a decision or order of a district court sitting in bankruptcy is controlled by Sec. 1291, 28 U.S.C. See also Matter of UNR Industries, Inc., 725 F.2d 1111, 1114-6 (7th Cir. 1984). While section 1291 limits jurisdiction to appeals from "all final decisions of the district courts," the concept of finality under such statute has traditionally been

applied "in a more pragmatic and less technical way in bankruptcy cases than in other situations." Amatex, supra, at 1039. Judge Breyer in In Re Saco Local Development Corp., 711 F.2d 441, 443-5 (1st Cir. 1983) has traced this traditional rule of more liberal construction of finality as applied to appeals in bankruptcy cases over the years. In tracing appealability under the statute in bankruptcy cases, Judge Breyer noted the definition of a "proceeding" in bankruptcy as stated in Taylor v. Voss, 271 U.S. 176, 181 (1926), as "not the overall liquidation or reorganization, but rather an individual 'matter[] of an administrative character . . . presented in the ordinary course of the administration of the bankrupt's estate." (Emphasis added by Judge Breyer.) He then declared on the basis of this

determination that "any dispute between a bankrupt and his creditors over a claim or priority was a separate 'proceeding' and an order settling such dispute was appealable." 711 F.2d at 445. Such is but another practical expressing of the principle that "finality" under 1291 is to be given not an absolute and inflexible construction in bankruptcy cases in which a "functional" and "practical" application is to be the rule.

The special or unique reason for this relaxed rule of appealability in bankruptcy is that

> [b]ankruptcy cases frequently involve protracted proceedings with many parties participating. To avoid the waste of time and resources that might result from reviewing discrete portions of the action only after a plan of reorganization is approved, courts have permitted appellate review of orders that in other contexts might be considered interlocutory. In Re Amatex, supra, at 1039.

This particular appeal illustrates well the justification for the relaxed rule of appealability in bankruptcy cases. Should appeal be denied and trials proceed in the district court of the myriad of claims involved with the possibility of reversal on appeal from a final decision in such proceedings, months and months of litigation, carried on at great expense to all concerned might be voided and the reorganization derailed, with consequent extensive delays both in reorganization and in resolution of the claims of the tort plaintiffs themselves. Weighty considerations of fairness and efficient judicial administration, therefore, mandate appealability in this case. We accordingly dismiss Robins' challenge to the appealability of the order in question.

Were it necessary, appealability could be sustained under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546-47 (1949), as well as in mandamus. See In re Ralson [sic] Purina Co., 726 F.2d 1002, 1005 (4th Cir. 1984). We, however, prefer to ground our decision on the more relaxed standard of finality for appeal purposes under 1291 traditionally assigned bankruptcy appeals.

Turning to the merits of the appeal on this part of the case, we address first the power of the district court, sitting in bankruptcy, to enter an order fixing the venue for the trial of tort personal injury claims against the debtor and for transferring all such cases to the bankruptcy court for trial and disposition. Section 157(b)(5), 28 U.S.C. states:

> The district court shall order that personal injury tort

> and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

We do not understand the appellants to contend that under this language the district court did not have authority under this statute to issue an order fixing the venue for trial of tort cases against a Chapter 11 debtor. They do argue, however, that the sense of the section, if not its precise language, was to decentralize the trial of those tort claims and to permit their continuance for trial in the court in which the complaints were filed and that the ruling of the district judge in this case fixing venue in the district court in which the bankruptcy petition was filed flies in the face of this congressional purpose. They refer to the language of Senator

Dole in commenting on the Senate Conference Report on the 1984 amendments and construe it as suggesting that tort claims were to be tried in the court in which those claims were originally filed. Senator Dole, in the language to which appellants refer and out of which the appellants arrive at their finding of the sense of the Congress, actually restated simply the language of the statute itself. He said that "where abstention does not occur,[14] those cases [i.e., "personal injury cases"] will be handled by the district court where the bankruptcy has been filed or, if that court

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[14] "Mandatory abstention under section 1334(c)(2) is not applicable to personal injury claims, but the district court may abstain as a matter of discretion and lift the stay of the state court action." Taggart, The New Bankruptcy Court System, 59 American Bank. L.J. 231, 253 (1985).

finds it appropriate, where the claim arose." Statement by Hon. Robert Dole 130 Cong. Rec. S 8889 (daily ed. June 29, 1984), reprinted in, 1984 U.S. Code Cong. & Ad. News 586, 587. We discern nothing in that language to warrant the conclusion that, in enacting the statute the Congress favored decentralizing the administration of the bankruptcy by leaving all "personal injury cases" to the court in the place where the claim "arose." In fact, to accept the view of the appellants on the construction of the statute would be completely at variance with the House version of the bill, which was in effect accepted by the Conference Committee, and would be to adopt the Senate version, which, according to Congressman Kastenmeier's statement as a House Conference member, was "largely reject[ed]" by the Conference Committee

and "would have dissipated the assets of the estate by creating a multiplicity of forums for the adjudication of parts of a bankruptcy case."[15]

Nor do we find anything in In re White Motor Credit, 761 F.2d 270, 273-4 (6th Cir. 1985), also relied on by the appellants, that lends support to appellant's construction of Sec. 157(b)(5). The extent of the holding in White Motor was that the district court had the power under the statute to allow products liability cases to be tried where the claim arose; there was nothing in the opinion, however, that declared that such action was mandated or even preferred. Specifically, there was no statement in

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[15]Statement by the Hon. Robert Kastenmeier, 130 Cong.Rec. H.7492, reprinted in 1984 U.S. Code Cong. & Adm. News at 579.

the opinion that the district court in which the bankruptcy was pending could not try the claim. Unquestionably the district court in this case had the power under the statute to fix the trial venue in its district for all the Dalkon Shield cases.

The primary point of difference between the parties, however, relates not so much to the power of the district court in this case to fix venue for all the pending Dalkon Shield tort cases--that power is stated in unmistakable terms in section 157(b)(5)--but to the manner in which that power may be exercised. Concededly [sic], section 157(b)(5) does not prescribe any procedure. The appellants suggest that the procedure to be follows is laid out in 28 U.S.C. Sec. 1412, which provides that "[a] district court may transfer a case or

proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties." As the appellants correctly construe section 1412, the authority to transfer a suit under that statute rests solely with the court in which the suit is pending and it provides no authority whatsoever to a district court sitting in bankruptcy in one district and having jurisdiction of the bankruptcy to transfer the venue of a case against the bankrupt to another district. Section 157(b)(5), however, expressly confers on the district court sitting in bankruptcy and having jurisdiction of the bankruptcy proceedings the power to fix the venue of any tort case against the debtor pending in other districts. The purpose of this latter statute was, as Congressman Kastenmeier

declared, to centralize the administration of the estate and to eliminate the "multiplicity of forums for the adjudication of parts of a bankruptcy case." 130 Cong. Rec. H 7492, June 29, 1984, reprinted in 1984 U.S. Code Cong. & Adm. News at 579. That purpose would be thwarted and the plain language of section 157(b)(5) nullified if the power of the district court sitting in bankruptcy to fix the venue for tort claims against a debtor was to be preempted by the provisions of section 1412. We do not believe this to have been the intention of Congress in enacting the two statutes. Section 157(b)(5) was drafted to cover the procedure in connection with a special group of cases, to wit, personal injury tort claims against a debtor in Chapter 11 proceedings wherever pending and in that connection the section is

supreme. In all other cases related to the bankruptcy proceeding, however, the general statute (i.e., section 1412) would govern. This, we think, is the proper construction to be given the two statutes. It is a construction which harmonizes the two sections. It conforms to that established canon of statutory construction that "[w]e must read the statutes [in those instances where there is any possible conflict] to give effect to each if we can do so while preserving their sense and purpose." Watt v. Alaska, 451 U.S. 259, 267 (1981); Columbia Gas v. Federal Energy Regulatory Comm., 651 F.2d 1146, 1158 (5th Cir. 1981); Pennsylvania v. Dept. of Health & Human Resources, 723 F.2d 1114, 1119 (3d Cir. 1983). To accept the appellants' interpretation and to negate the plain language of Sec. 157(b)(5) "would violate

the basic principle of construction that statutes should be read, if possible, as harmonious texts." Leaf Tobacco Exporters Assn. v. Block, 749 F.2d 1106, 1115 (4th Cir. 1984). We, therefore, have no difficulty in finding that the district judge's authority to fix venue of personal injury tort actions against the debtor exists under Sec. 157(b)(5), irrespective of the district in which such controversy is pending.

And there are very real considerations that support a centralization of all the Dalkon Shield claims, at least at first, in the district court having jurisdiction of the bankruptcy. The "single focal point" of this proceeding is the development of a reasonable plan of reorganization for the debtor, one which will work a rehabilitation of the debtor and at the same time assure fair

and non-preferential resolution of the Dalkon Shield claims. See In re Towner v. Petroleum Co., 48 B.R. 182, 190 (W.D.Okla. 1985). These Dalkon Shield claims, asserted by thousands of individuals in courts through the United States on behalf of both citizens of this country and citizens or residents of other countries, represent what are characterized in the Act as "contingent or unliquidated claims." 11 U.S.C. Sec. 502. Ordinarily such claims would be "estimated" by the bankruptcy court as a "core proceeding," 28 U.S.C. Sec. 157(b)(2), for purpose of allowance if failure to do so "would unduly delay the administration of the case." 11 U.S.C. Sec. 502(c); 3 Collier of Bankruptcy, Sec. 502.03 (15 ed. 1982). That duty of estimation in a proper case under section 502(c) is not a permissive one; it is a

mandatory obligation of the bankruptcy court. In re Nova Real Estate Inv. Trust, 23 B.R. 62 (E.D.Va. 1982). This customary process of estimation of contingent claims is, however, different where the unliquidated, contingent claims are personal injury tort claims.

Section 157(b)(2)(B) excepts from the definition of "core proceedings" personal tort claims against the debtor. The bankruptcy court thus is without authority under the Act over "the liquidation or estimation of contingent or unliquidated personal injury or wrongful death claims against the estate for purposes of distribution under Title 11" 28 U.S.C. Sec. 157(b)(2)(B). (Italics added) It will be observed, however, that the statute denies authority to the bankruptcy court to "estimate" contingent claims only if the purpose is to make a

"distribution" of the assets of the debtor; the statute does not in express terms deny to the bankruptcy court the authority, or relieve it of the duty, to "estimate" the contingent "personal injury" claims for purposes of determining the feasibility of a reorganization. And such has been the construction of the statute which has been adopted by the courts which have had to face the issue, the two leading cases being proceedings arising out of the asbestos litigation. Roberts v. Johns-Manville Corp., 45 B.R. 823, 825-26 (S.D.N.Y. 1984); In re UNR Industries, Inc., 45 B.R. 322, 326-27 (N.D.Ill. 1984). Both of these cases hold that estimations of the debtors' potential personal injury tort liabilities as an incident of the development of a plan of reorganization are core proceedings within the bankruptcy court's

jurisdiction and that such estimations are not foreclosed by Section 157(b)(5) of the Act.[16]

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[16] Roberts at 826 said:

> Even assuming that section 157(b)(5) requires that all personal injury and wrongful death claims be tried in the district courts, the Court does not find that immediate withdrawal and liquidation of Roberts' claim is appropriate. Section 157(b)(2)(B) does not exclude from the definition of core proceedings estimations of personal injury and wrongful death claims for all purposes. The section is limited to estimation "for purposes of distribution." This leaves estimation for other purposes within the jurisdiction of the bankruptcy court. See In re UNR Industries, 45 B.R. 322 (N.D. Ill. 1984). A trial is not needed, therefore, to satisfy the requirement of section 502(c) that "all claims against the debtor be converted into dollar amounts." (citing Congressional sources). Thus, even if the Code and the 1984 Act require that each and every
>
> (Footnote Continued)

This is not to say the personal injury claimants in this proceeding will not be ultimately entitled, if they elect to do so, to have a jury trial of their claim in the district court. Section 157(b)(5) gives them that right. But, even though the tort claimants may be entitled to their jury trials, the bankruptcy court is not relieved of its duty in a Chapter 11 proceeding to estimate those contingent claims. The real question thus arises as to which proceedings takes precedence, whether the estimation by the bankruptcy court of the claims or the jury trials in the district court of the claims. The authorities

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(Footnote Continued)
asbestos claim filed in this eventually be tried, they do not require immediate withdrawal of those claims before a reorganization plan has been confirmed.

which have considered this question in connection with a complicated products liability situation such as this are all unanimous. The estimations of the potential and pending claims by the bankruptcy courts should precede any trials of the claims. This was specifically held in the asbestos cases. Roberts v. Johns-Manville Corp., 45 B.R. at 825-26. After all, the first and primary purpose of the proceedings, however, is to ascertain whether a fair reorganization of the debtor can be achieved. This purpose may well be completely thwarted if the energies of the debtor's executives and officers are initially diverted by, and the resources of the debtor are dissipated in the expenses of litigating, the trial of thousands of personal injury suits in courts through the land spread over an

interminable period of time. As the Court in Newton v. Johns-Manville Corp., 45 B.R. 827, 830 (S.D.N.Y. 1984), put it, in explaining its decision to proceed in the estimation of the claims before setting any claim for trial: there is no "sense in ordering a trial of a [tort claimant's] claim against Manville until a plan has been developed for Manville and until there is reason to believe that the time and expense of potentially 25,000 personal injury trials of the claims against Manville will not deplete the estate and leave other creditors with empty judgments."

There are 5,000 suits pending against the debtor in this proceeding. There are perhaps an equal number not filed. If all these claims were to be tried, the expense of discovery proceedings and trial would likely consume all

the assets of the debtor and exhaust all the resources of its executives and employees. As one court has commented, we "must be mindful of the realities of modern litigation. Pre-trial discovery under modern federal practice has become a monster on the loose . . . . Pre-trial proceedings have become more costly and important than trials themselves." In re Johns-Manville, supra, 40 B.R. at 224. Since the Dalkon Shield litigation began, forty claims have actually been tried but over $517,000,000 have been expended in defending or settling Dalkon Shield suits or claims. It is impossible to anticipate the stupendous costs that would be involved if all the claims here had to be tried. If the claimants as a whole are to realize reasonable compensation for their claims, it is obviously in the interest of the class of claimants as a

whole to obviate the tremendous expense of trying these cases separately. If the bankruptcy court could arrive at a fair estimation of the value of all the claims and submit a fair plan of reorganization based on such estimation, with some mechanism for dispute resolution and acceptable to all interested parties, great benefit to all the claimants could be achieved and the excessive expense of innumerable trials, stretching over an interminable time, could be avoided.[17]

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[17]Section 157(b)(5) "does not mandate that all tort actions must be tried in district curt, but only those which are not settled otherwise. . . ." Bankruptcy Service, L.Ed. Sec. 2:14.5, at 22 (Supp. 1985) (summarizing Roberts v. Johns-Manville, supra, 45 B.R. at 825-26), and "the parties are certainly free to agree to a dispute-resolution procedure that does not involve trial," UNR, supra, 45 B.R. at 326. To the same effect is Newton v. Johns-Manville Corp., 45 B.R. 827, 830 (S.D.N.Y. 1984).

In addition, the real purpose of the proceeding (i.e., a reorganization of the debtor and its continuance as a going business) could be attained.

It is manifest, of course, that the process of estimation will involve some examination of the claims. But this examination will be conducted by the court, will likely not involve duplicative discovery, and can be accomplished expeditiously. It was argued in In re UNR Industries, Inc., 45 B.R. 322 (N.D. Ill. 1984), though, that this would require a hearing by the bankruptcy court in making its estimation of the tort claims and accordingly would "not be any more efficient than ordering district court trials." The court dismissed the argument with this apt comment:

> This contention both understates the time and expense of trials and overstates the time and expense of

> the estimation process. Even should Judge Toles decide the Towers study is insufficient to accurately estimate asbestos claims and that some sort of hearing is necessary, there is no reason to believe 17,000 hearings must be held to get an accurate enough picture of the debtor's liability to asbestos victims. 45 B.C.[sic] at 326.

That language is applicable in this case. It is unlikely that all 8,000 to 10,000 claims which have been filed would have to be tried before an intelligent estimation of the claims could be made by the bankruptcy court. The interests of all the claimants and the public interest in a reasonable and fair reorganization combine in favor of an effort at an estimation of the Dalkon Shield claims as a basis for formulating such a plan of reorganization and as a possible step in working out a mechanism acceptable to all the claimants for a dispute-resolution of their claims without burdening the estate

with the tremendous expense of endless litigation and reducing if not exhausting, the assets available for paying those claims.

No progress along estimating these contingent claims, however, can be made until all Dalkon Shield claims and suits are centralized before a single forum where all interests can be heard and in which the interests of all claimants with one another may be harmonized. Cf. Fidelity Mortgage Investors v. Camelia Builders, Inc., 550 F.2d 47, 55 (2d Cir. 1976), cert. denied, 429 U.S. 1093. That undoubtedly was the purpose of the motion to fix venue and to transfer the pending suits to the district court sitting in bankruptcy before which the proceedings were pending. This unquestionably was the idea which prompted the district court to opt tentatively in his order

fixing venue in the district court sitting in bankruptcy for all these claims. We approve of the idea and find it conducive of the interests of all concerned.

However persuasive may be the reasons for fixing temporarily at least venue of all the pending suits against the debtor in the district court sitting in bankruptcy where all the other Dalkon Shield claims not in suit may be handled together, the question remains as to what procedure must be followed in effecting such change of venue in order to satisfy the requirements of due process. It is the position of the appellants that a right of action in tort is "property" which may not under due process be adversely affected by an involuntary change of venue in the absence of a full hearing after reasonable notice. It may

be accepted that, as the appellants argue, a tort claim or action is a "species of property" in the constitutional sense. Logan v. Timmerman Brush Co., 455 U.S. 422, 428 (1982); cf. Martinez v. California, 444 U.S. 277, 281-82 (1980). Similarly, it may be agreed that where the plaintiff has such a claim against a debtor in a Chapter 11 proceeding, he has a statutory right to a jury trial in a district court and that the place of such trial is an important right which may be entitled to some form of due process protection under the broad principles of Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). The question is, though, what form such protection must take.

"Due process" does not establish an inflexible standard to be rigorously applied in all cases. Recently, in

McClelland v. Massinga, ___F.2d___ (4th Cir. 1986), we said that "due process is not 'a technical conception' of 'inflexible procedures' (citing Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961) nor is it 'a mechanical instrument' or 'yardstick'; it is rather 'a delicate process of adjustment' and of a balancing of interests in which it is recognized 'that what is unfair in one situation may be fair in another . . . .'" In particular, it is important to recognize that the notice and hearing is not "always require[d] . . . prior to the initial deprivation of property" and that "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate." Parratt v. Taylor, 451 U.S.

527, 540 (1981). We conclude, therefore, that due process requires some form of notice and opportunity for a hearing before there can be a change of venue and before trial of a personal injury tort cause of action against a debtor may be transferred finally from the court in which the cause was initially filed to the district where the bankruptcy proceedings are pending.

We reach this conclusion not only under due process analysis, but also under the language and Rules issued under the Bankruptcy Act. In our opinion, the debtor's motion herein qualified as a "contested matter" under the Act. As such it had to be begun by the filing of a motion with "reasonable notice and opportunity for hearing . . . afforded the party against whom [the] relief [was] sought." Bankruptcy Rule 9014. The

debtor filed with the district court sitting in bankruptcy an appropriate motion for a fixing of venue and for transfer of tort claims against the debtor, and notice in the manner provided by the Rules in this case was given but only to the Committee of Representatives of Dalkon Shield claimants. There was no notice given the individual Dalkon Shield claimants who had causes of action against the debtor pending in court. Counsel for the debtor asserted in argument in district court in justification of failure to serve the individual plaintiffs in the tort actions that "in these cases the traditional rule is that you serve the counsel for the Committee, and the Committee, the counsel then has the obligation to bring such matters as are appropriate to the attention of the members of the Committee." Counsel cited

no authority for this "traditional rule." The Committee, however, contends that notice to it was not notice to the individual claimants and that such notice did not satisfy the notice requirements of Bankruptcy Rule 9014 or of due process.

The role of the Committees appointed under the Act as revised has received considerable discussion but remains somewhat uncertain. As we have already noted, the status and position of Chapter 11 Committees are thoroughly canvassed in Andrews, The Chapter 11 Creditors' Committee: Statutory Watchdog?, 2 Bankruptcy Developments Journal, 247 (1985). As that article indicates, the Committee's right to intervene and be heard in any proceeding is, we think, fairly established. Matter of Marin Motor Oil., Inc., 689 F.2d 445, 454-6 (3d Cir.),

cert. denied, 459 U.S. 1206 (1983). In fact, the Rules require that certain notices in the course of the proceedings must be given the Committee. But it seems clear under the Rules that the Committee is not authorized to represent the individual interests of any claimant, as distinguished from the general interests of all claimants, In re Johns-Manville, 26 B.R. 919, 926 (S.D.N.Y. 1983), and only in certain specific situations, no one of which is relevant here, may proper service be made on the Committee rather than on the individual claimants themselves under Bankruptcy Rule 2002(i). It follows that, in our opinion, service of notice of the hearing on the motion to fix venue and to transfer, as given only to the Committee did not represent compliance with Bankruptcy Rule 9014 or with due process.

Conceding that notice to the Committee did not qualify as service on individual claimants, it does not follow that the absence of such notice may be fatal to due process in this proceeding. The notice to the Committee may have been sufficient under Cleveland Bd. of Education v. Loudermill, ___U.S.___, 84 L.Ed.2d 494, 506 (1984), to permit the issuance of a provisional or conditional order providing for a fixing of venue in the district court sitting in bankruptcy for all the pending Dalkon Shield cases against the debtor but giving the claimants individual notice and an opportunity to object and to be heard before the order became final in any case where the plaintiff has filed an objection. That procedure would satisfy due process under Parratt and the other cases. And, as we read the record as well as the formal

order of the district court, this is precisely what the district court intended, though the language of its order may be obscure on the point.

The district court entered a ruling bringing for the time being all the pending suits against the debtor before the district court sitting in bankruptcy in order to proceed expeditiously in the reorganization but with the definite condition that any party might object and might petition for abstention in his or her case. It was in our opinion intended as a conditional order, though not clearly stated as such. We are of the opinion, because of this possible want of clarity in the order assailed, that such order must be modified to make it crystal clear that the determination of venue therein is, as we have said, conditional, dependent finally and ultimately on a

ruling to be made only after notice to all claimants advising them of their right to enter any objections they may have to such a tentative ruling and to submit a motion for abstention in their particular case.[18] The notice to be given all claimants could be in the form of a letter both to the claimant and to his or her attorney stating the conditional ruling made subject to a final hearing, to become final only after reasonable opportunity given all claimants to object and/or to seek abstention. We would think the notice should fix a

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[18]Until the conditional order is made final with regard to a particular case, a case should not be physically transferred. Thus, no filing fee shall be paid under Rule 9027 or expenditures accompanying photocopying, freight, etc. be made. Only after an order is final shall the expense of transfer be necessary.

time limit for the filing of objections by claimants and should fix a day for a hearing on the objections. The tentative order might be made final as to any claimant who failed to enter an objection within the prescribed time. The mailing of the notice as required will not involve any great expense. Such a modification of the order, followed by a notice in the form suggested, it would seem, should satisfy the requirements of due process and of the Bankruptcy Rules in the unusual circumstances of this case. In order to achieve this modification in the order of the district judge, this phase of the appeal is remanded to the district court for further proceedings in accordance with the opinion herein.

We do not presume to suggest rigid guidelines for the district judge to

follow when considering objections to the transfer. We believe it important, however, to observe that although there may be distinct advantages of the tort claims being transferred to Richmond, those advantages should be balanced against the disadvantages that may be advanced at the hearing. In that regard, some cases may be fully prepared and ready for state trial. Some cases may require substantial numbers of local witnesses. Claimants may be receiving critical medical, physical or psychological care in a local area which would have to be halted or transferred to Richmond. All of these factors are relevant. Moreover, there are issues of state law that may substantially affect the results in individual cases.

In summary, we affirm the district court's order staying the suits of the

plaintiffs against the debtor and all co-defendants, but remand with directions the order fixing venue for all pending suits against the debtor and transferring the suits to the district court before which the bankruptcy proceedings were pending.

AFFIRMED IN PART

and

REMANDED WITH DIRECTIONS.

FILED
Oct 11 4o-PM '85
Clerk, U.S. District Court
Richmond, Virginia

FILED
Oct 11, 1985
Clerk, U.S.
District
Court
Richmond, VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

A.H.ROBINS COMPANY, INCORPORATED, Debtor	Bankruptcy No. 85-01307-R
v.	AP No. 85-1006-R
NANCY CAMPBELL, et als., Defendants	

FINDINGS OF FACT AND CONCLUSIONS OF LAW
AS STATED FROM THE BENCH

Before: Honorable Robert R. Merhige, Jr.
United States District Judge

Richmond, Virginia
October 9, 1985

THE COURT: I think Judge Shelley can probably do this better than I. We either misunderstood each other or I disagree with him. In either event, you are stuck with me. So there you go.

I have trouble with 11 U.S.C. Sec.362 covering anything but the

protection of the property of the bankrupt, to be perfectly frank with you. But let me do the best I can. You all do what you want to do.

This is a motion filed by the debtor seeking to enjoin certain actions now pending in various courts throughout the country. Additionally, debtor seeks a declaration under 28 U.S. C. Sec. 2201, that the automatic stay provided for under 11 U. S.C. Sec. 362 embraces actions against its insurer and insured co-defendants. The debtor contends that even if the Court does not hold that Sec. 362(A) precludes actions against the debtor's insurance carrier (and here is where I have a little problem--though I do find that actions against the insurance carrier are likely to diminish the fund that is available to the debtor for the benefit of creditors).

As to indemnified and insured co-defendants and other co-defendants, that it seeks relief under 11 U.S.C. Sec. 105(a) which provides that (and this is where I think you are entitled to your relief for sure), "The Court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. Sec.105(a). At issue for now are the eight suits that are pending. Now, let me go over those very briefly.

I may mispronounce them. Dicharry, et al. v. A. H. Robins Co. and Aetna Life and Casualty. I don't know who is handling that as plaintiff, but they have sued Aetna Life and Casualty. Maybe that is who they intended to sue, I don't know. But those are what the papers in front of me reflect. Discharry [sic] is pending in the Eastern District of

Lousianna [sic], and is set for February 24, 1986.

Plaintiff's complaint seeks damages against both of the defendants on the basis of strict liability and alternatively breach of duty and/or negligence of A. H. Robins in several respects. It would appear Aetna's liability is premised on strict liability, the nature of which I cannot tell from the complaint. The complaint does not allege facts to support that conclusion.

Now, as to Dicharry, everybody agrees that they cannot bring actions against Robins, so that claim has to be severed, or forgotten about because of the stay.

The Court finds from the evidence before it that there are approximately 2,400 suits outstanding joining entities

or persons with Robins as parties. I do not want to face 2,400 of these.

Article 6 of Robins' Articles of Incorporation provides indemnification for certain of their officers, directors, and employees. Robins' insurance policy also includes, as insureds, the vendors of Dalkon Shield, as well as Dr. Davis, who was the inventor of the product. Dr. Davis is also indemnified by Robins.

Let me go to the next case, Piccinin v. A. H. Robins Co. and Aetna Casualty and Surety. The case has not been set for trial. The plaintiff has sought leave to commence discovery against Aetna. Mr. Pope recognizes that Sec. 362 stays the plaintiff's action against Robins. The claim against Aetna is premised on Aetna's own alleged actions and alleged failure to act. Plaintiff alleges that Robins and Aetna were

engaged in a joint enterprise and that they were joint tort feasors and conspirators. In essence, the complaint alleges the actions of one were the actions of the other.

Next is Mosa v. A. H. Robins and Hugh J. Davis, Jr., M.D., which I believe is in the District of Maryland. In Mosa, plaintiffs already severed Robins. Plaintiff's complaint alleges false and deceptive advertising, fraud and deceit, subjecting the plaintiff to involuntary testing, negligence, strict liability for making a defective product, strict liability for alleged misrepresentation on the part of both defendants, breach of both implied and expressed warranties by both defendants. Violation of the F. D.A. Cosmetic Act, deliberately failing to recall the product, negligence in failing to recall, conspiracy to

misrepresent, to conceal, and to commit fraud. I cannot for the life of me see how Robins is not going to get right in the middle of that one, at least their people.

Next is the Barnett case filed in state court, in the 9th Judicial Circuit of Florida, in Orange County. Barnett v. Aetna Casualty and Surety, A. H. Robins Company, Florida Physicians Supply and Medical Supply Company of Jacksonville, I believe.

The evidence before me would indicate that Florida Physicians Supply and Medical Supply Company are both indemnified by Robins. The complaint alleges that Robins was negligent, that they were guilty of fraud and misrepresentation, that both Robins and Aetna jointly and severally violated the laws of the United Sates and Florida, i.e., the Food, Drug

and Cosmetic Act. As to Robins, the Florida Physicians Supply and Medical Supply Company plaintiff claims strict liability. She also claims a breach of implied and express warranties from each of those parties, and that Robins knew about it.

There is a case pending in the Superior Court of New Haven, Connecticut: Ruminski v. A. H. Robins and Dr. Holly. The complaint alleges as to Robins a lack of testing, defective design and manufacturing, lack of proper and adequate instructions, failure to warn as to Dr. Holly, and negligence in diagnosis and treatment.

Now, this case is the one that bothers me the most, to be perfectly frank with you. It looks like a medical malpractice suit against the doctor. I also point out that the allegation of

Paragraph 16 sort of confused me: the plaintiff alleges Dr. Holly told her that she did not have a Dalkon Shield and would be able to become pregnant. It seems to me that is a perfect defense for Robins, and maybe it would be one you would want to lift the stay to defend. However, I have a feeling that it is just a typographical error, but I am not at all sure.

The next one is Conrad v. David, M. D., Clark, M. D. and A. H. Robins, filed in the City of Baltimore. As to all defendants it is alleged that they were negligent in testing, manufacturing, marketing, and promoting; misrepresentation; negligent enterprise between the parties; fraudulent misrepresentation; fraudulent concealment; and conspiracy among the parties to commit fraud.

Then there is the Campbell case in the Western District of Wisconsin. That is against Robins and Aetna Casualty and Surety Company, E. Claiborne Robins, Sr., Mr. Robins, Jr., and Hugh J. Davis. M. D.

Campbell alleges violation of the R.I.C.O. Act (which may have already been disposed of, I don't know), negligence, strict liability, breach of implied and express warranties, misrepresentations, and fraud.

Finally, there is the Camp case, which I had here a few minutes ago. I will not go into the details of it.

There is not any question that 11 U.S.C. Sec. 362(A) creates an automatic stay of all actions against the debtor. See Lynch v. Johns-Mansville Sales Corp., 710 F.2d 1194 (6th Cir. 1983). See also Williford v. Armstong, 715 F.2d 124 (4th Cir.1983).

Now, 11 U.S.C. Sec. 362, as I view it--and I think the cases so interpret it--the purpose of the stay is to give a debtor a "breathing spell" from its creditors. It stops all collection efforts and harassment, and that language is used frequently. The stay permits the debtor to attempt to repay or to create a reorganization plan, and it further provides for equal treatment of all creditors.

It is correct, as counsel has pointed out, that the Williford case held that the petitioners, who were joint tort feasors, were not entitled to a discretionary stay under the Court's general equity powers pending resolution of the bankruptcy claims of their co-defendants. But in Williford, the court held that its power to enjoin called for the exercise of judgment which must weigh competing

interests and maintain an even balance. Parties seeking a stay must make out a clear case of hardship or inequity in being required to go forward if there is even a fair possibility that the stay sought will work damages to someone else. See Williford, 715 F.2d at 129, quoting Landis v. North American Co., 299 U.S. 248, 255 (1936).

Well, I think there is a big difference between the Williford case and the instant case. I think there is a big difference between the Metals case and the instant case. Here we have potentially 2,400 suits involving other people--people who may or may not be indemnified. I do not think I have to make that ruling: it would appear from the evidence that most of them are indemnified by Robins. It would also appear from the evidence that anywhere

insurance is involved, any judgment covered by Aetna will lower the amount recoverable by other people. Vendors are protected under the policy according to the evidence before me. That conclusion is all subject, of course, to change.

I think 11 U.S.C. Sec. 105(A) is simply a codification of the principles enunciated in this circuit in Blackwelder Furniture, 550 F.2d, 189 (4th Cir. 1977), and Televest v. Bradshaw, 618 F.2d 1029, 1032 (4th Cir. 1980). Those principles are first, the Court must look to whether there is irreparable harm to either of the parties, the likelihood of success on the merits, and the public interest. See also In re Otero Mills, Inc., Sec. 21 B.R.777 (1982).

There is also--I cite not in support of this proposition--the Metal Center

case, 31 B.R. 458 (1983). I do not think that case is on point, and if it is, I disagree with the court's conclusion: that a debtor guarantor is not bound by a judgment against the party so indemnified. At least as to the amount which might go against the guarantee. I do not see any difference between that type of thing and one of thse [sic] claimants who has already gotten a judgment against Robins or who has settled a case, even though they have not been paid. That amount is set!, and nobody can change it. I am satisfied that situation is the same thing here.

The success of our instant case depends on the probability of a successful plan of reorganization. These outside suits frankly interfere with the exclusivity of the debtor to establish a plan, and that is what we are after. I

do not see how these individual plaintiffs can be harmed by an injunction, at least until a plan has been filed. Then the Court, given an opportunity after soliciting counsel's views, can judge the merits of the plan, or the lack thereof.

Certainly the public interest requires that the Court consider, under Fourth Circuit principles, an orderly procedure leading to a successful reorganization.

As I said before, this very proceeding is proof of the difficulties to be anticipated if an injunction does not issue. I do not see how Mr. Forrest and whoever else is responsible for the plan and can develop it without the help of other Robins' employees. They ought to be free from distractions,and they cannot be if these suits are allowed to proceed to trial. It is inevitable that the

nature of these law suits will involve Robins' personnel. I find that the law suits have a detrimental effect on the debtor's assets.

Anything else?

Well, Judge Shelley suggests that requiring Robins to reject executory contracts would affect the officers in operating the Company.

Well, I will accept that as part of my conclusion. He is right. If relief were not granted here, we would have a rush to judgment: we would have 5,000 law suits filed throughout the country against anybody that counsel thought they had a reasonable chance of getting a judgment against. No, these suits are enjoined. As far as I am concerned, the law of this case is that all such suits will be enjoined. If you have any trouble, come in.

Certainly they are enjoined. This decision is a preliminary until the reorganization plan is either rejected or accepted. Then we can see much more intelligently how much effect, if any, these suits might have on the debtor's assets. That is it.

Thank you very much for your help.

Go ahead and draw a sketch, Mr. Cogar.

Pass it over here.

I would like to see Mr. Cogar, counsel for the debtor, and counsel for the claimants. Mr. Manchester, I have no objection to your coming it--the trustee --also counsel for the government.

RECEIVED
OCT 11 1985
Clerk, U.S. Dist.
Court, Richmond, VA

FILED
OCT 11 1985
DAPR
Clerk, U.S.
District Court
Richmond, VA

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

In re:	)	Chapter 11
	)	Case No. 85-
A.H. ROBINS COMPANY, INCORPORATED,	)	01307-R
	)	
Debtor.	)	
	)	
Employer's Tax Identification No. 54-0486348	)	
	)	
A.H. ROBINS COMPANY, INCORPORATED,	)	Adversary Proceeding No. 85-1006-R
Plaintiff,	)	
v.	)	
	)	
NANCY CAMPBELL, KATHRYN CONRAD, JEANETTE DICHARRY and VERNON DICHARRY, ANNA PICCININ, LUISA MOSA and JACK MOSA, STELLA J. CAMP and JOHN H. CAMP, HELEN BARNETT and MICHAEL BARNETT, and EDNA LINDSEY RUMINSKI,	)	(Retained Proceeding)
Defendants.	)	

ORDER FOR PRELIMINARY INJUNCTION

This cause came on to be heard on plaintiff's motion for preliminary injunction. The Court having considered plaintiff's complaint, the memorandum of law and the declarations in support of the motion and the papers filed in opposition thereto and, having heard testimony and argument and considered the evidence presented, the Court adopts its remarks and rulings as stated from the bench and makes the following findings of fact, conclusions of law, and order for a preliminary injunction pursuant to Bankruptcy Rule 7065 and Federal Rule of Civil Procedure 65(d), all objections by opposing counsel being duly preserved:

Findings of Fact

As of August 21, 1985, the plaintiff in this action, A.H. Robins Company, Incorporated ("Robins") was named as the

defendant in approximately 5,000 civil actions in state and federal courts throughout the country alleging injuries and seeking damages stemming from Robins' manufacture and marketing of the Dalkon Shield intrauterine contraceptive device. Pursuant to 11 U.S.C. Section 362(a), all litigation against Robins in those approximately 5,000 civil actions was stayed automatically on August 21, 1985 upon filing of Robins' petition for protection from its creditors under Chapter 11.

Approximately 2,400 of those civil actions name persons or entities other than Robins as co-defendants. Those approximately 2,400 civil actions seek damages from Robins co-defendants based upon theories of liability which are derivative of or interrelated with the causes of action or claims for relief

asserted against Robins. Any judgment rendered against a Robins co-defendant in any one of those approximately 2,400 civil actions could result in a claim against Robins for either contractual indemnity or commonlaw contribution. Although Robins may be entitled to relitigate the issue of its liability to each indemnity or contribution claim, the burden on Robins' estate of such litigation would significantly impede Robins' reorganization and render any plan of reorganization futile.

Moreover, many of those 2,400 civil actions against the co-defendants would require the participation of Robins' officers, executives and employees as witnesses and in pre-trial and post-trial proceedings. The diversion of Robins' key personnel from the reorganization effort which would result from

continuation of litigation in those 2,400 civil actions would impair Robins' reorganization effort and would be contrary to the public interest.

The continuation of litigation in those 2,400 civil actions which name Robins' co-defendants poses a significant threat to Robins' reorganization effort and could cause a direct and substantial drain upon the assets of Robins' Chapter 11 estate. If this relief sought is not granted, a rush to judgment will likely ensue. Such a race to obtain judgments against Robins' co-defendants would be detrimental to the debtor and would adversely affect Robins' reorganization effort.

Any rejection by the debtor of its contractual duty to indemnify its officers, directors, and employees would adversely affect the debtor and would not

be consistent with the debtor's reorganization under Chapter 11.

Defendant Nancy Campbell has a civil action pending in the United States Court for The Western District of Wisconsin. In her complaint Ms. Campbell asserts claims against Robins, The Aetna Casualty and Surety Company, E. Claiborne Robins, Sr., E. Claiborne Robins, Jr. and Dr. Hugh J. Davis. Ms. Campbell seeks recovery from those defendants under theories of negligence, strict liability, implied and express warranties, misrepresentation, fraud and under the Racketeer Influcenced [sic] and Corrupt Organization Act ("RICO"). The continuation of litigation in the Campbell Action against any of Robins' co-defendants threatens property of the debtor's estate and threatens to impair and impede the debtor's reorganization effort.

Defendant Kathryn Conrad has a civil action pending in the Circuit Court for Baltimore City. In her complaint, Ms. Conrad asserts claims against Robins, Dr. Hugh J. Davis and Dr. Frederick A. Clark, Jr. Ms. Conrad seeks recovery from those defendants under theories of negligence, strict liability, fraudulent misrepresentation and conspiracy. The continuation of litigation in the Conrad action against any of Robins' co-defendants threatens property of the debtor's estate and threatens to impair and impede the debtor's reorganization effort.

Defendants Jeanette Dicharry and Vernon Dicharry have a civil action pending in The United States District Court for the Eastern District of Louisiana. In their complaint, the Dicharrys assert claims against Robins and Aetna Casualty and Surety Company

(served herein as Aetna Life and Casualty). The Dicharrys seek recovery from those defendants under theories of strict liability, negligence, misrepresentation and breach of warranty. The continuation of litigation in the Dicharry Action against Aetna Casualty and Surety Company threatens property of the debtor's estate and threatens to impair and impede the debtor's reorganization effort.

Defendant Anna Piccinin has a civil action pending in The United States District Court for The Middle District of Alabama. In her complaint, Ms. Piccinin asserts claims against Robins and The Aetna Casualty and Surety Company. Ms. Piccinin seeks recovery from those defendants under theories of conspiracy, fraud, negligence, misrepresentation and breach of warranty. The continuation of litigation in the Piccinin Action against

The Aetna Casualty and Surety Company will impair and impede the debtor's reorganization effort.

Defendants Luisa Mosa and Jack Mosa have a civil action pending in The United States District Court for the District of Maryland. In their complaint, the Mosas assert claims against Robins and Dr. Hugh J. Davis. The Mosas seek recovery from those defendants under theories of fraud and deceit, involuntary testing and battery, negligence, strict liability, breach of warranty, violation of the Federal Food and Drug Act and conspiracy. The continuation of litigation in The Mosa Action against Dr. Hugh J. Davis threatens property of the debtor's estate and threatens to impair and impede the debtor's reorganization effort.

Defendants Stella J. Camp and John H. Camp have a civil action pending in

The Circuit Court for Madison County, Alabama. In their complaint, the Camps assert claims against Robins, D.L.K., Incorporated and John or Jane Does numbers three through nine. The Camps seek recovery from those defendants under theories of negligence, strict liability, misrepresentation, breach of warranty, conspiracy and fraud. The continuation of litigation in The Camp Action against any of Robins' co-defendants threatens to impair and impede the debtor's reorganization effort.

Defendants Helen Barnett and Michael Barnett have a civil action pending in the Circuit Court of the Ninth Judicial Circuit, Orange County, Florida. In their complaint, the Barnetts assert claims against Robins, Aetna Casualty and Surety Company, Florida Physicians Supply, Incorporated and Medical Supply

Company of Jacksonville. The Barnetts seek recovery from those defendants under theories of willful negligence, fraud and misrepresentation, violation of State and Federal Food and Drug Acts, strict liability, breach of warranty and battery. The continuation of litigation in the Barnett Action against any of Robins' co-defendants threatens property of the debtor's estate and threatens to impair and impede the debtor's reorganization effort.

Defendant Edna Lindsey Ruminski has a civil action pending in the Superior Court for the Judicial District of new Haven, Connecticut. In her complaint, Ms. Ruminski asserts claims against Robins and Dr. Marshall R. Holley. Ms. Ruminski seeks recovery from those defendants under theories of negligence. The continuation of litigation in the

Ruminski Action against Dr. Marshall R. Holley threatens to impair and impede the debtor's reorganization effort.

The eight civil actions described above are representative examples of similar civil actions among the approximately 2,400 civil actions currently pending against Robins which name persons or entities other than Robins as co-defendants. The continuation of litigation in those approximately 2,400 civil actions against the various categories of co-defendants represented by the eight civil actions described above would pose a serious threat to the success of the debtor's reorganization and is contrary to the public interest.

Conclusions of Law

The District Court exercising its jurisdiction under 28 U.S.C. Sections 1334(b) and (d), has the authority

pursuant to 11 U.S.C. Section 105 and 28 U.S.C. Section 1651, to stay all actions which adversely affect the estate of the debtor and the debtor's reorganization effort and to stay all actions which will impair and impede the debtor's reorganization effort.

Robins has established that the likelihood of irreparable harm to Robins if this injunction is not granted outweighs the likelihood of irreparable harm to the defendants if the injunction is granted.

Robins has established the likelihood of its success on the merits and the likelihood of a successful reorganization if it is not burdened by continued litigation against it and its co-defendants.

Robins has established that the granting of this preliminary injunction is in the public interest.

The conclusions of law contained in this order constitute the law of this case and shall be applied with equal force to all defendants similarly situated who are brought to the attention of this court.

To the extent any of the foregoing conclusions of law constitute findings of fact, they are to be deemed as such, and vice-versa.

Order

Based upon the foregoing, and good cause appearing therefor, it is hereby

DECLARED all available proceeds of liability insurance issued to Robins are property of the debtor's estate pursuant to 11 U.S.C. Section 541 and any civil action seeking a judgment that might be

satisfied from the proceeds of that insurance is automatically stayed pursuant to 11 U.S.C. Section 362(a);

ORDERED defendant Nancy Campbell is enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. 85-C-230-S currently pending in the United States District Court for the Western District of Wisconsin; and further

ORDERED defendant Kathryn Conrad is enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. 85231036 currently pending in the Circuit Court for the City of Baltimore, State of Maryland; and further

ORDERED defendants Jeanette Dicharry and Vernon Dicharry are enjoined and restrained from continuing with

litigation against any of the defendants named in Civil Action No. 85-1243 currently pending in the Unites States District Court for the Eastern District of Louisiana; and further

ORDERED defendant Anna Piccinin is enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. CV-85-H-9120-N currently pending in the United States District Court for the Middle District of Alabama; and further

ORDERED defendants Luisa Mosa and Jack Mosa are enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. H82-49 currently pending in the United States District Court for the District of Maryland; and further

ORDERED defendants Stella J. Camp and John H. Camp are enjoined and

restrained from continuing with litigation against any of the defendants named in Civil Action No. CV-85-671-W currently pending in the Circuit Court for Madison County, State of Alabama; and further

ORDERED defendants Helen Barnett and Michael Barnett are enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. 83-5426 currently pending in the Circuit Court for the Ninth Judicial District, Orange County, State of Florida; and further

ORDERED defendant Edna Lindsey Ruminski is enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. CV-81-0209979-S currently pending in the Superior Court for the Judicial District of New Haven, State of Connecticut.

This injunction shall remain in force until further order of this Court.

DATED:

10-11-85

Nunc pro tunc 10-9-85

/s/ Robert R. Merhige, Jr.

UNITED STATES DISTRICT JUDGE

WE ASK FOR THIS;

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RECEIVED
Nov 8 1985
Clerk, U.S. Dist. Court
Richmond, Va.

FILED
IN OPEN COURT
Nov. 9, 1985
Clerk, U.S. Dist.
Richmond, Va.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

In re

A.H. ROBINS COMPANY INCORPORATED	)	Case No.85-01307-R
Debtor.	)	Retained Proceeding (Judge Merhige)
EMPLOYER'S TAX IDENTIFICATION No. 54-0486348	)	

ORDER PURSUANT TO
28 U.S.C. SECTIONS 157(b)(5) AND 1334(b)
AND 11 U.S.C. SECTION 105(a)

Upon the motion of A. H. Robins Company, Incorporated ("Robins), for orders pursuant to 28 U.S.C. Sections 157(b) (5) and 1334(b), and 11 U.S. C. Section 105(a) for determination of trial venue, identification of cases "related to" this Chapter 11 case and transfer of

cases; the Court having considered the motion, the memorandum of law, the Statement of Financial Affairs For Debtor Engaged in Business Question 12 (Exhibit 1), and having heard the arguments of counsel and good cause appearing therefor, it is hereby

ORDERED, pursuant to Sections 157(b)(5) and 1334(b) of Title 28 of the United States Code, that to the extent personal injury tort or wrongful death actions against Robins or any other defendant that are related to the Robins Chapter 11 case are to be tried in a district court, such action shall be tried in the Richmond Division of the United States District Court for the Eastern District of Virginia; and it is further

ORDERED, pursuant to Section 1334(b) of Title 28 of the United States Code,

that all actions based upon personal injury tort or wrongful death claims arising from the use of the Dalkon Shield intrauterine contraceptive device are proceedings related to this Chapter 11 case over which this Court has jurisdiction; and it is further

ORDERED that all actions related to the Robins Chapter 11 case, as determined by this Order, now pending in any federal district court or subsequently removed to any federal district court during the pendency of this Chapter 11 case, be transferred by the Clerks of those Courts to this Court; and it is further

ORDERED that nothing contained herein shall affect or limit the power of this Court to abstain from hearing any particular proceeding under Section 1334(c)(1) of the United States Code or

remanding any particular proceeding under Section 1452(b) of the United States Code.

DATED: /s/November 9,1985

/s/Robert R.Merhige, Jr.
United States District Judge
NOTICE OF JUDGMENT OR ORDER
Entered on docket 11-12-85

(Handwritten) This Order is stayed for a period of five (5) days from this date.
/s/Robert R. Merhige, Jr.
11-9-85

We ask for this:

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FILED
MAY 14, 1986
US COURT OF APPEALS
Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 85-2183(L)

A.H.Robins Company, Inc.,	Appellee,
versus	
Anna Piccinin,	Appellant.
and	
Nancy Campbell, et al,	Defendants.
Aetna Casualty and Surety Company,	Intervenor/ Appellee.

No. 85-2184

A.H.Robins Company, Inc.,	Debtor.
A.H.Robins Company, Inc.,	Appellee,
versus	
Committee Representatives of Dalkon Shield Claimants,	Appellants.

Aetna Casualty and Surety Company — Intervenor/ Appellee.

No. 85-2185

A.H. Robins Company, Inc., — Debtor.

A. H. Robins Company, Inc., — Appellee,

versus

Kathryn Conrad, Luisa and Jack Mosa, — Appellants.

No. 85-2186

In Re:

A.H. Robins Company, Inc., — Debtor.

A. H. Robins Company, Inc., — Appellee,

versus

Anna Piccinin, — Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, District Judge.

Upon consideration of the petition of appellant Piccinin for rehearing;

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Russell, with the concurrence of Judge Chapman and Judge Swygert, Senior U. S. Circuit Judge sitting by designation.

For the Court,

/s/JOHN M. GREACEN
Clerk

CERTIFICATE OF SERVICE

I, C. Neal Pope, do hereby certify that I am a member of the Bar of The Supreme Court of the United States. I further certify that I have served the foregoing Appendix to Petition for Writ of Certiorari upon each Respondent by mailing three copies of the same properly addressed, postage prepaid, to each of the following:

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This 8th day of August, 1986.

C. Neal Pope

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